

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2953-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RACHEL JENSEN,

Plaintiff-Appellant,

v.

J.C. PENNEY LIFE INSURANCE COMPANY,

Defendant-Respondent.

APPEAL from an order of the circuit court for Monroe County:
STEVEN L. ABBOTT, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Rachel Jensen appeals from a summary judgment in favor of J.C. Penney Life Insurance Company. The issue is whether a provision in an accidental death insurance policy issued by J.C. Penney excluding coverage for loss that occurs while the covered person's blood alcohol

content is .10 percent or greater is contrary to public policy. We conclude that the policy exclusion is not contrary to public policy. Accordingly, we affirm.¹

The facts are not disputed. Gunnar Jensen, the insured, went to a tavern, consumed alcohol, and left near midnight. On his drive home along a dike road located near a marsh, Jensen lost control of his vehicle and proceeded down the bank into a cranberry marsh where the vehicle turned over. Jensen was found dead the next day. He had drowned in the marsh. Jensen's blood alcohol content at the time of the accident was .234 percent.

At the time of his death, Jensen was covered by an insurance policy issued by J.C. Penney providing an accidental death benefit of \$100,000. J.C. Penney refused to pay the death benefit on the basis of an exclusion in its policy which provided: "No benefit shall be paid for [l]oss that ... occurs while the [c]overed [p]erson's blood alcohol is .10 percent weight per volume or higher; a causal connection between the injury and the loss is not required." The trial court granted summary judgment in favor of J.C. Penney based on this exclusion.

Summary judgment allows disputes to be settled without trial where there are no disputed material facts and only legal issues are presented. *In re Cherokee Park Plat*, 113 Wis.2d 112, 115, 334 N.W.2d 580, 582-83 (Ct. App. 1983). On review of an order for summary judgment, we employ the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We first examine the pleadings and affidavits to determine whether a claim for relief has been stated. *Id.* If a claim for relief has been stated, we then determine whether any factual issues exist. *Id.* If there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court's order granting summary judgment. *Id.*

"Contracts of insurance are controlled by the same principles of law that are applicable to other contracts." *Garriguenc v. Love*, 67 Wis.2d 130,

¹ Pursuant to this court's order dated November 16, 1995, this case was submitted to the court on the expedited appeals calendar. See RULE 809.17, STATS.

134, 226 N.W.2d 414, 417 (1975). To determine whether a contract is unenforceable as a matter of public policy, we balance "the interest in the enforcement of the particular promise against the policy against enforcement of such terms." *Blossom Farm Prods. Co. v. Kasson Cheese Co.*, 133 Wis.2d 386, 394-95, 395 N.W.2d 619, 623 (Ct. App. 1986). "In weighing a public policy against enforcement of a term, account is taken of: (1) the strength of that policy as manifested by legislation or judicial decisions; [and] (2) the likelihood that a refusal to enforce the term will further that policy" *Id.*

Jensen argues that public policy precludes exclusionary clauses based on intoxication in accidental death insurance contracts. In support, she points to §§ 632.32(1) and 632.32(6)(b)4, STATS., which provide:

632.32(1) Provisions of motor vehicle insurance policies.

(1) Scope. Except as otherwise provided, this section applies to every policy of insurance issued or delivered in this state against the insured's liability for loss or damage resulting from accident caused by any motor vehicle, whether the loss or damage is to property or to a person.

632.32(6)(b)4. No policy may exclude from the coverage afforded or benefits provided: ... [a]ny use of the motor vehicle for unlawful purposes, or for transportation of liquor in violation of law, or while the driver is under the influence of an intoxicant or a controlled substance under ch. 161 or a combination thereof, under the influence of any other drug to a degree which renders him or her incapable of safely driving ... or any use of the motor vehicle in a reckless manner.

While acknowledging that § 632.32, STATS., deals exclusively with motor vehicle insurance, Jensen contends that it should apply to this case because her husband suffered "loss [of life] ... resulting from [an] accident caused by [a] motor vehicle." Jensen bolsters her argument by citing a case in which the supreme court stated that § 632.32 should be broadly interpreted to protect innocent third parties. *See Estate of Logan v. Northwestern Nat'l Casualty Co.*, 144 Wis.2d 318, 348, 424 N.W.2d 179, 190 (1988).

Although the *Logan* court stated that § 632.32, STATS., was designed to protect innocent third parties, *Logan* specifically said that § 632.32 applied only to automobile *liability* insurance. *Id.* at 349, 424 N.W.2d at 190. The court stated that automobile liability policies were unique "in part because of the existence of legislation which in certain circumstances requires insurance for the benefit of innocent third parties." *Id.* We agree with J.C. Penney that "[w]hile Mr. Jensen happened to be in his vehicle at the time of his death, the claim here is for benefits from an accidental death policy which has nothing whatsoever to do with his automobile insurance."

The legislature has not enacted a statutory prohibition against intoxication exclusions in accidental death insurance policies as it did with § 632.32(6)(b)4 for automobile insurance policies. Because the legislature has prohibited these exclusions in one type of insurance contract but not in another, we do not agree with Jensen that § 632.32, STATS., is an expression of a general legislative policy against intoxication exclusions in all insurance contracts. The policy considerations applicable to automobile liability insurance and accidental death insurance are very different. Automobile liability insurance protects both the insured and innocent third parties who might be physically harmed by the actions of the insured. Accidental death insurance provides no similar benefit to the society at large. We conclude that the terms of the J.C Penney policy are enforceable. The exclusion is not void as a matter of public policy.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.